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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 906

SARA BLUM,

Petitioner,

v.

TENTH DISTRICT COMMITTEE OF THE VIRGINIA STATE BAR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on June 16, 1969. A petition for rehearing was timely filed, and denied by order of that court entered on September 5, 1969. The jurisdiction of this Court is invoked under Title 28, Section 1254(1) of the United States Code.

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia is reported at 210 Va. 5; 168 S.E. 2d 121. A copy is appended hereto as Appendix A.

QUESTIONS PRESENTED FOR REVIEW

I.

Under the due process clause of the Fourteenth Amendment to the Federal Constitution, can a court disbar an attorney on charges of which the attorney is given no notice prior to or during the hearing accorded her, where there is lack of substantial evidence, and without making findings to provide a proper basis for appeal?

II.

Does the disbarment power of a court extend to depriving an attorney of the right to practice, without evidence supporting the charges, or proof either of unfitness or moral turpitude?

III.

Where a state statute specifies the ground for disbarment, can a court on the basis of its inherent disciplinary jurisdiction disregard such limitations?

IV.

Can a disbarment proceeding, with no provision for jury trial or the other protections accorded an accused in a criminal proceeding, be used as a substitute for a criminal prosecution against an attorney?

V.

Under the Fourteenth Amendment, may a lawyer be deprived of the right to practice his profession without proof of unfitness or moral turpitude?

VI.

Can a Court disbar an attorney from the practice of law when there is no evidence of unfitness to continue practicing and it is apparent from the record that this extreme penalty is not warranted.

STATEMENT OF THE CASE

The Charges

Petitioner is a United States citizen and one of the few women attorneys in active practice in the State of Virginia. She was charged with malpractice and unprofessional conduct, in that she and an associate were "guilty of malpractice and of unworthy, corrupt and unprofessional conduct" specifically in failing to account to Theresa M. McMillan (hereinafter referred to as the "client"), for her share of the proceeds of a house sale, for applying toward their fees all of the client's share in said sum without her authorization and without agreement as to the amount of the fee, for charging an excessive and unwarranted fee for the particular case and the services involved and for dilatory tactics and failing to report to and communicate with the client. Petitioner and her associate were tried by a three judge panel of the Circuit Court of Arlington County.

The Evidence at Trial

The uncontroverted evidence adduced at the trial established that the petitioner and her associate were employed by the client for the purpose of securing a divorce from her husband. She was at that time pregnant, carrying a child conceived as the result of a relationship with a man other than her husband, but did not reveal this fact to petitioner. The petitioner did not learn of it until after the birth of the child, and then through the sister-in-law of the client; the client having left the area hurriedly, leaving her problems for petitioner to solve. A divorce suit was filed by petitioner, an answer submitted by the client's husband, who had blinded himself playing Russian Roulette months

prior to these divorce proceedings, and a hearing was held before a Commissioner as provided by Virginia statute. The client's husband made no appearance at that time, either himself or through counsel. Shortly thereafter, in November 1962, and prior to the Commissioner's submitting a report to the court, the client moved to Idaho, where the father of the putative child lived. Then, within a few weeks, she went through a marriage ceremony with him, the client knowing at this time that she was not divorced. The client's testimony at trial in response to petitioner's questioning on this critical point was as follows:

Q. "You knew you weren't divorced?"
A. "I wanted to believe I was. I wanted to believe it was all over." (R. p. 50, 51)[1]
Q. "Did you go through a marriage ceremony with Mr. Donaldson?"
A. "Yes, ma'am."
Q. "Did you have a final decree from this Court that you were divorced from Mr. McMillan?"
A. "No." (R. p. 51)
Q. "There was a waiting period after you received the final decree?"
A. "Yes." (R. p. 52)

Before her departure, the client gave petitioner and her associate a power of attorney to arrange the sale of her house, and authorized them to take all steps necessary for the purpose, instructing them to charge their fees against the proceeds of such sale.

The client married one Donaldson in December 1962. The child was born several weeks thereafter, and when her husband learned of this marriage, he filed a cross-bill in the divorce action, on the ground of adultery. The cross-bill was subsequently dismissed, and a decree of divorce granted in favor of the client on August 12, 1964, on the basis of the original hearing.

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[1] R. refers to Record.

Petitioner and her associate arranged the sale of the client's interest in her home, and the client was notified that the house was "now going to be sold" (CT. 14).[2] They retained her interest in the proceeds of the sale of the house, in the sum of $1,760.25, which was applied to the fees owing them for services and for disbursements in connection with the divorce proceedings, the sale of the house, and other litigation in which the client was involved. The client testified that "when the house was sold then I would have enough money to pay you whatever else you said was necessary." (R. pp. 37-38) Petitioner sent the client a detailed statement of services, and a bill for the balance owing after deduction of the proceeds of sale, although the client denied having received such statement until some time thereafter. The client wrote to Petitioner in February 1963 (CT. 30): "May God grant you the wisdom to solve this McMillan mess. I know you are doing everything you can to push it (the divorce) through." Three months prior to this, she married one Donaldson.

When the client returned to the area she took up residence in Maryland, where she retained an attorney "for our problems in Maryland" (CT. 35), who wrote to the petitioner and her associate requesting an accounting. Petitioner did not answer this letter, and thereafter sent the client another copy of the bill showing a balance of $539.76 owing. The client then addressed a letter to respondents, asking them why no answer had been received to her Maryland attorney's letter; and the respondents then filed charges.

The Judicial Proceedings

Petitioner and her associate were tried before the Circuit Court of Arlington County Virginia, without a jury, prosecuted by the Commonwealth Attorney. The trial court entered an order finding them "guilty as charged", without findings of fact or conclusions of law, except the statement in its order that their conduct was of such a serious nature

[2]CT. refers to Committee Transcript. (This was made a part of the Record by stipulation.)

that their licenses to practice law should be revoked. Petitioner appealed to the Supreme Court of Appeals of Virginia, which affirmed the judgment of the trial court in an opinion dated June 16, 1969. Petitioner filed a timely petition for rehearing and review on July 15, 1969, which petition was denied under date of September 5, 1969.

Objections and Exceptions Taken by Petitioner

Objection and exception taken to Judgment of Circuit Court of Arlington County dated June 26, 1967 (Record, page 2).

Exception by Assignment of Error filed and printed in brief of Petitioner; Assignments of error (Record, pages 3-4).

Exceptions to deletions in transcript taken by letter to Judge McCarthy letter dated August 1967 (Record, pages 5-6). Exception taken to letter missing which was an exhibit in committee hearing showing permission by client to be paid fees from proceeds of sale by letter to Judge McCarthy from Petitioner dated August 17, 1967 (Record, pp. 5-6).

Objection and Exceptions taken to distortions in Attorney General brief filed February 3, 1969; in Reply Brief of Petitioner filed February 14, 1969.

Objections taken to injection of Canon 11 on page 12 of Attorney General Brief; in Reply Brief of Petitioner, page 11.

Petitioner filed a Petition for Rehearing and Review, July 15, 1969, as an objection to the Decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Section 1, Constitution of the United States:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuniites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 54-74, Code of Virginia: Procedure for suspension or revocation of license.–

> (1) Issuance of rule. If the Supreme Court of Appeals, or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any persons to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that any person practicing law not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended . . .
>
> (6) "Any malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct" as used in this section, shall be construed to include the improper solicitation of any legal or professional business or employment, either directly or indirectly, or the failure, without sufficient cause, within a reasonable time after demand, of any attorney at law, to pay over and deliver to the person entitled thereto, any money, security or other property, which has come into his hands as such attorney.

Sec. 18-171, Code of Virginia:

> Embezzlement deemed larceny; indictment; statement from Attorney for the Commonwealth.—If any person wrongfully and fraudulently use, dispose of, conceal or embezzle any money, bill, note, check, order, draft, bond, receipt, bill of lading or any other personal property tangible or intangible, which he shall have received for another or for his employer, principal or bailor, or by virtue of his office, trust, or employment, or which shall have been entrusted or delivered to him by another or by any court, corporation or company, he shall be deemed guilty of larceny thereof, and may be indicted as for larceny. But proof of embezzlement under this section shall be sufficient to sustain the charge.

REASONS FOR GRANTING THE WRIT

There exist in this case a number of instances of serious departures from standards of judicial proceedings recognized by this Court and courts of the States as constituting want of due process.

This is a disbarment case, which the Court has characterized as quasi-criminal, affecting as it does the very livelihood, as well as the character and reputation, of a public officer, and yet without the procedural protections provided a person subjected to the normal criminal processes. *In Re Paschal*, 10 Wall. 438.

In *State v. New Mexico*, 382 U.S. 978, the Court said:

> "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process clause or equal protection clause of the Fourteenth Amendment."

Lack of Notice

This Court, in the case of *In re Ruffalo*, 390 U.S. 544, reaffirmed that it would examine State disbarment proceedings to determine whether procedural due process was satisfied. It said:

> "These are adversary proceedings of a quasi-criminal nature . . . m m m m m m m m m m m m m m the proceedings commence. They become a trap when, after they are rendered, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statement . . .
>
> "This absence of proper notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process."

The notice requirement of due process was not met, in that fair notice was not given to petitioner that she was being charged with the misappropriation of trust property, or a violation of Canon 11 of the Canons of Professional Ethics of the American Bar Association. No mention was made of this either in the letter of the client to the respondent or in the report the respondent submitted to the trial court. Nevertheless, the petitioner was found to have mishandled the client's funds, in violation of Canon 11, and the respondent's brief in the court below made specific reference to that Canon (Page 14, Attorney General's brief filed February 1969).

Without notice of the charge, the petitioner was in no position to defend herself, and for the trial court to have made a determination of guilt of an offense with which the petitioner was not charged is a violation of due process.

The Absence of Findings

The disbarment proceeding here involved was initiated by an unverified letter of the client, a complaint filed in layman's language detailing allegations of fact. Based upon this, charges were made against petitioner and a trial was

held. The trial court, without making any fact findings, simply found petitioner guilty as charged, placing her under a severe handicap in seeking review.

A verdict of this type should specify a finding on each charge or count. In a proceeding such as here, involving so many possible issues, and where the complaint is in the form of a letter in informal language, the simple finding of guilty without any supporting fact findings or legal conclusions does not conform with the basic requirements of judicial proceedings or with the fundamentals of fair trial as incorporated in the Fourteenth Amendment.

The opinion of the court below recites the asserted failure of the petitioner to justify the fees charged to the client, on the basis of which payment of the proceeds of the sale of certain property of the client was withheld, both as agreed between the parties, and in any event within the petitioner's rights as an attorney, based upon her retaining lien. However, no finding was made in the opinion of the court below that the fees sought to be charged by the petitioner for the work done were excessive. Without such a finding there can be no basis for a determination that the petitioner refused without sufficient cause to pay the complainant any money.

Thus, what is essentially a fee question was converted by the action of the courts below into a ground for disbarment. In so doing, the courts below exceeded the reasonable area of permissible regulation over the relations between attorney and client. True, a suit for an accounting lies under such circumstances, but this is a civil matter unless it is established that the amounts charged and retained by the attorney are excessive. Here, however, without any such determination, the court below specifically found, and grounded its judgment on, the failure to deliver monies to the client.

Certainly, without a determination of the relative rights of the parties to such proceeds based upon the professional relationship that existed between them, the taking away of the livelihood of an attorney in the exercise of the asserted disciplinary power of a court is a departure from the estab-

lished standards of judicial behavior which calls for the exercise of this Court's supervisory power.

Statutory Limitation

Virginia is one of the States of the Union where the legislature saw fit to circumscribe the authority of the courts to suspend and revoke licenses to practice law, by defining malpractice and moral turpitude as including (1) solicitation of legal business, and (2) the failure after demand to pay over money and property coming into his hand of an attorney. Code of Virginia, Sec. 54-74(6). A reading of the opinion of the court below, which quotes this Code provision, indicates that the disbarment in this case is based on (1) asserted misinformation as to the status of a divorcee action; (2) the failure to provide an accounting of the proceeds of the sale of the property, and (3) the excessiveness in petitioner's charges for services rendered. None of these is a ground under the statute for suspension or disbarment, although it might have been the basis for other disciplinary action, and the courts below exceeded the jurisdictional limit imposed by the legislature on their authority to disbar and suspend attorneys from the practice of law.

Limitations on the Disbarment Power

This Court has taken occasion to point out that the power of a court to disbar an attorney is subject to other very severe limitations. The Court has recognized that the disbarment power cannot be exercised arbitrarily, simply by reason of the fact that attorneys-at-law deal with the courts, any more than with respect to the pursuit of any other profession or vocation. *Ex Parte Wall*, 107 U.S. 265. The Court said, in *Ex Parte Secombe*, 19 How. 113:

> "The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained

by the court, as the rights and dignity of the court itself."

The state courts have recognized this principle, as reflected in the following examples in the Illinois Courts. In *People ex rel Chicago Bar Association v. Matthews*, 217 Ill. 94, 75 N.E. 444, the court characterized disciplinary citations against attorneys in these terms:

> "The punishment to be inflicted by disbarment upon an attorney is the destruction of his professional life. Only clear and satisfactory proof can justify a decision from which would flow consequences of such grave nature."

See also *People ex rel Chicago Bar Association v. Silha*, 252 Ill. 385, 96 N.E. 826, and *People ex rel Chicago Bar Association v. Baker*, 311 Ill. 66, 142 N.E. 554, the latter case holding that an "attorney is entitled to practice his profession and should not be denied the right to do so except upon clear proof of willful and corrupt professional misconduct."

In determining the motives of one charged with unprofessional conduct, the practice observed by the profession generally is to be considered. *People ex rel Chicago Bar Association v. Edelson*, 313 Ill. 601, 145 N.E. 246. The State of Virginia recognizes the lien of an attorney against funds of the client in his possession. 2 Michies' Jurisprudence, sec. 52, p. 516. *Stevens v. Sparks*, 205 Va. 128, 135 S.E.2d 140. This lien relates to any property which comes into the attorney's possession and continues until the general balance due him for his professional services is paid. *Capehart v. Church*, 136 W.Va. 939, 69 S.E.2d 127; *In Re Gillespie*, 190 Fed. 888.

In the letter from the Maryland attorney, dated August 2, 1965, appended hereto as Appendix B, he said: "The check for any amounts in excess of the fee should be sent to Mrs. Donaldson." This shows his awareness that petitioner was authorized to deduct fees and that the client had authorized it. Operating on this basis, the petitioner

retained possession of the proceeds of the sale of the client's property, and submitted to the client a detailed breakdown of services and disbursements, and a statement indicating that an additional balance was due on account of those services. The client made no objection to the statement of services or the balance asserted to be due therefor, and the petitioner concluded that remittance of the balance due was simply delayed.

The court below in the present case made no finding that the petitioner's character was such that public policy required her being excluded from the practice of law. In essence, the petitioner was found guilty of having withheld monies as fees and disbursements, and of failing to respond to a letter of another attorney relating thereto. Petitioner was deprived in the course of her trial of the opportunity to establish that the client was made aware of the fact that petitioner's fees were to be taken out from the proceeds of the sale of the client's property. (R. 37-38). If permitted to be proved, this would have established that the funds petitioner was holding were properly hers, or at least subject to a retaining lien, and not the client's.

Under these circumstances, the court below had no justification in concluding that the petitioner was guilty of such moral turpitude, in holding the proceeds of sale, as to justify her being disbarred. Petitioner's actions were taken in good faith and with notice to the client, under an honest assertion of a legal right, and there is nothing to indicate corrupt motives on her part.

An attorney's retaining lien applies even though the client claims no fees are owing. *In Re G. F. Redmond & Co.*, 17 F.2d 501; *People ex rel Chicago Bar Association v. Kwasigrock*, 296 Ill. 542; 130 N.E. 344; *Doran v. Campbell*, 194 S.W. 674; *In Re Kraus*, 322 Pa. 362; 185 Atl. 737. The courts have held that even though an attorney under such circumstances might be guilty of an error of judgment as to the law, this does not give rise to any basis for disciplinary action. *In Re Kling*, 44 Cal. App. 267, 186 Pac. 152. Similarly, an attorney cannot be disbarred for an impropriety or breach of good taste committed under a mis-

taken view as to an attorney's responsibilities. *Maginnis' Case*, 269 Pa. 186, 112 Atl. 255. *In Re Thibodeau*, 295 Mass. 374, 3 N.E. 2d 749, 106 A.L.R. 542.

In *People ex rel Chicago Bar Association v. A'Brunswick*, 315 Ill. 442, 146 N.E. 483, it was held that an attorney charging no more than the services are reasonably worth may not be disciplined for refusing to return property of clients without complete releases. The Supreme Court of the State of Illinois said:

> "The power to disbar an attorney must be used in moderation and only on clear proof of misconduct charged and fraudulent or dishonest motives***he has the legal right the same as a man in any other business or profession to insist upon being paid and to take whatever legal steps are necessary to enforce payment."

Applying the principles set forth in the foregoing decisions to the present case, what we have here is at very most, evidence that the petitioner represented a woman who placed herself in a hazardous position, being pregnant by a man other than her husband, and not informing her attorney of that fact, the filing of suit for divorce, and the handling of other matters, including a civil action for $5,000.

In any event, where the action of an attorney asserted as a ground for disbarment constitutes the violation of criminal law, such action cannot properly be made the subject of disbarment proceedings and must be made the subject of criminal prosecution with the protections afforded to the accused therein.

In the present case, petitioner was found guilty of having diverted trust funds, which under section 18-171 of the Virginia Code, quoted above in the statutory provisions involved, constitutes a criminal offense. Accordingly, she must be prosecuted for those charges under the criminal procedures, and the disbarment authority of the court cannot be used as a means of avoiding the burden of proof,

the provision for jury trial, and the other protections to which a criminal accused is entitled under the Fourteenth Amendment.

The Protection of the Public

The Court has said that before a person may be deprived of the right to practice law, acquired as a result of years of training and corresponding expenditures of time and effort, it must be shown that such disbarment is absolutely necessary to protect the court and the public, and a lesser punishment will not serve the purpose. *Sacher v. Association of the Bar of the City of New York*, 347 U.S. 388.

There is no evidence whatever in the record to support such a finding on the part of the courts below in the present case, and, in fact they made no such finding. Under the circumstances, the judgment of disbarment is not only without legal foundation but constitutes so serious a departure from the accepted standards of judicial procedure as recognized by the courts as to call for the exercise of this Court's supervisory power.

The Absence of Proof

A judgment must be supported by substantial record evidence. This Court has so held with specific application to infirmity of proof of facts in disbarment proceedings. The Court has held, with particular reference to disbarment proceedings, that in order to support disbarment, a record must establish definite proof of unfitness or moral turpitude. In *Selling v. Radford*, 243 U.S. 46, 37 S.Ct. Rep. 377, the Court said:

> From an intrinsic consideration of the state record, it appears that the state procedure from want of notice or opportunity to be heard was wanting in due process; that there was such an infirmity of proof as to facts as to give rise to a great conviction that the conclusion of the state court cannot

> be accepted as final, or that some other grave reason exists leading to the conclusion that to follow the decision of the state court would conflict with the duty which rests upon us not to disbar.

Although petitioner was charged with making excessive and unwarranted charges for legal services, the Commonwealth Attorney who prosecuted the case offered no evidence whatever to support this allegation, so that there is nothing in the record to provide a legal basis for a determination of guilt in this respect.

The courts of the States have similarly held to a strict requirement of proof in disbarment cases. For example, in the case of *In Re Dodge*, 93 Minn. 160, 100 N.W. 684, it was held that: "Such a charge is so grave and the consequences of a conviction so serious, that something more than the preponderance of evidence—the rule in civil actions—is required. The rule in such a case is that, to justify a conviction, the evidence must be full, clear, and convincing."

The principle was stated differently in the case of *In re Haymond*, 121 Cal. 385, 53 Pac. 899, as follows:

> "An accusation against an attorney in disbarment proceedings is in the nature of a criminal charge and all intendments are in favor of the accused."

In *People ex rel Chicago Bar Association v. Matthews*, 217, Ill. 94, 75 N.E: 444, the court said:

> "A careful consideration of the testimony leaves us unable to say that charges set forth in the information filed against the respondent have been sustained by the character of proof required to justify the legal conclusion of guilty. The punishment to be inflicted by disbarment upon an attorney is the destruction of his professional life. Only clear and satisfactory proof can justify a decision from which would flow consequences of such grave nature. Rule Dismissed."

In *People ex rel Chicago Bar Association v. Kerker*, 315 Ill. 572, 146 N.E. 439, the court said:

> "Disbarment of an attorney is the death of his professional life. Regardless of whether the misconduct charged amounts to a crime or merely to professional misconduct, such charges must be proved by clear and convincing testimony."

Sufficiency of Charges

A court has authority to regulate the practice of law before it, but this authority is subject to the limitation that a court may not discipline a member of its bar for activities which are not of sufficient seriousness to constitute a legal basis for such disciplining. As said in *In Re Watts*, 190 U.S. 1:

> "The right of an attorney to appear and argue cases, acquired by his admission is not a mere indulgence revocable at the pleasure of the court, or by enactment of the legislature: but it is a right of which he can only be deprived for *moral or professional* delinquency, and by a judgment of the court.

See also *Ex Parte Garland*, 4 Wall. 333; *Ex Parte Burr*, 9 Wheat 529.

As in any other case, a proper cause of action must be asserted and proved to provide the basis for punitive measures against an attorney. Simply because the court concludes that an attorney should have acted differently from the way he did under a specific set of circumstances, or was even negligent in the manner of such performance, provides no justification for the court's restricting or prohibiting the continued right of the attorney to continue in the practice of law before it. Such action on the part of the court not only runs counter to a fundamental concept of the administration of justice that lawyers should not be placed under restraints imposed by the court for actions which do not actually interfere with the operation of the courts and the administration of justice—but also infringes the rights of personal liberty and property represented by the lawyer's right to act as an advocate and to earn a living

In essence, petitioner is being permanently disbarred for having failed to respond to a letter from an out-of-state attorney asking that any balance remaining from the sale

of a piece of property, after deduction of fees, be returned to a client, when in fact, no balance remained, and the client in fact owed a balance for fees and disbursements to the petitioner. This is, it is submitted, an unduly harsh punishment, and in striking contrast not only with the holdings of the courts of other states, but also of Virginia. For example, in the case of *Maddy v. District Committee*, 205 Va. 652, 138 S.E.2d 56, which involved false representations to clients, acceptance of fees without performance, and misrepresentation of a draft of a divorce decree to a client as a final decree although no decree had been issued or hearing held, a judgment of six months' suspension was sustained on appeal. In *Old v. Commonwealth*, 193 Va. 152, 67 S.E. 921, where an attorney collected funds for ten years and refused to account therefor, in the face of court orders requiring him to do so, the attorney was suspended from practice for two years.

It is evident that the penalty imposed upon the petitioner was extreme and unwarranted, even assuming that the charges had been proven.

CONCLUSION

As shown above, the courts below have violated the petitioner's right to procedural due process under the Fourteenth Amendment to the Constitution of the United States in a number of important respects, which taken together constitute such a serious departure from established judicial procedures and in such conflict with the precedents of this Court and the courts of the other States as to call for the exercise of this Court's supervisory authority.

Although the actions of the court below were based on state law, it is incumbent upon the Court to analyze the record in order that petitioner's constitutional rights may be protected, since short of this, review by the Court would fail of its purpose. *Norris v. Alabama*, 294 U.S. 587. The principal errors are errors of law, which do not require

a re-examination of the record in detail, but to the extent it is necessary, as stated in *Craig v. Harney*, 331 U.S. 367:

> "The present case is one of the type in which this Court is required to make an independent examination of the facts to determine whether a State has deprived a person of a fundamental right secured by the Constitution."

For the reasons set forth hereinbefore, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Pursuant to Rule IV, §13, of the Integrated Bar, the Tenth District Committee of the Virginia State Bar, after a hearing on a written complaint filed with it by Mrs. Theresa Donaldson charging Stephen F. Ostatnik and Sara Blum, partners practing law in the city of Alexandria, with malpractice and unprofessional conduct, filed in the clerk's office of the court below its report and verified complaint with respect to these charges.* It stated that it was the unanimous finding of the Committee that the defendants were jointly and severally "guilty of malpractice and of unworthy, corrupt and unprofessional conduct, specifically in failing to account to their client for her share of house sale proceeds, for applying toward their fee all of their client's share in said house sale proceeds without her authorization and without agreement as to the amount of the fee, for charging an excessive and unwarranted fee for the particular case and the services involved, and for dilatory tactics and failing to report to and communicate with their client," and that a "charge of disbarment" was "merited as to both" of them.

In accord with Code §54-74, a rule was issued on which both defendants were tried by a three-judge court. After hearing the testimony of the witnesses offered by the Committee and that of the two defendants, and considering the transcript of the hearing before the Tenth District Committee admitted by consent, the court entered an order finding that both defendants were guilty as charged in the report and complaint, and that their conduct was "of such a serious nature" that their licenses to practice law in this State should be, and were, revoked.

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*The written complaint was filed with the Committee on December 20, 1965. After notice, both defendants appeared before the Committee where the charges against them were heard on May 13 and June 17, 1966. Neither defendant testified at the hearings before the Committee, but both participated in the cross-examination of the witnesses.

In her assignments of error the principal contentions of this appellant, Sara Blum, are that the evidence was not sufficient to sustain the finding that she was guilty of the charges preferred against her, and that the judgment revoking her license to practice law was "harsh, unwarranted and unjustified." We do not agree with these contentions.

The pertinent facts are these: In June, 1962, Mrs. Theresa McMilland employed Ostatnik and Blum to prosecute a suit for divorce against her husband, Arlin T. McMillan, on the ground of constructive desertion. The agreed fee was $250 to $350 if the suit was uncontested, but if contested, "it could be double" that amount. A retainer agreement was signed and shortly thereafter Mrs. McMillan paid the defendants $400 on account of attorneys' fees to be incurred.

On July 9, 1962, Ostatnik and Blum filed in the Circuit Court of Arlington County a suit for divorce on behalf of the wife and a petition for the custody of her minor children. The husband filed an answer denying the wife's right to a divorce and the custody of their children. Shortly thereafter the matter was referred to a special commissioner who was directed to take the depositions of the witnesses and report his findings and recommendations. Depositions of the witnesses on behalf of the wife were taken on November 7, 1962, but because counsel for the husband was not present at the time he objected to the consideration of them by the commissioner. Pending the settlement of this objection, the report of the commissioner was not filed until July 29, 1964. On August 11, 1964 a decree was entered confirming the commissioner's report and granting the wife an absolute divorce.

Shortly after Mrs. McMillan had introduced her evidence before the commissioner, on November 7, 1962, she was told by the attorneys that as far as the divorce suit was concerned, "it was all over" and that she had "nothing to worry about except the property settlement" with her husband. Relying upon this advice, Mrs. McMillan moved with her children from her residence in Arlington, Virginia, to

Idaho Falls, Idaho, where she took up her residence. Before leaving she executed a power of attorney, dated November 9, 1962, authorizing Ostatnik and Blum, among other things, to sell her interest in any real estate which she owned and to receive payment therefor.

Believing that her divorce action had been successfully concluded, she married Walter A. Donaldson in Idaho in December, 1962. When her former husband McMillan learned of this, and knowing that her divorce suit against him had not been concluded, he filed a cross-bill against her alleging that she was guilty of adultery with Donaldson. However, no action was taken on this cross-bill and it was subsequently withdrawn.

In August, 1963, Mrs. Donaldson and her then husband left Idaho and established a residence at Wheaton, Maryland, a suburb of Washington. Not until then did she learn that her divorce suit had not been prosecuted to a successful conclusion. Ostatnik informed her that "there had been a little trouble but not to worry about a thing and everything was all right."

In the fall of 1963, not being satisfied as to the status of her divorce action, Mrs. Donaldson employed James Miller, Jr., an attorney at Rockville, Maryland, to inquire into the matter. Miller found and reported to her that she had not been granted a divorce form her husband, Arlin T. McMillan.

Later, Mrs. Donaldson found that the house in Arlington, owned jointly by her and her former husband, had been sold in June, 1963 by real estate agents engaged by Ostatnik and Blum; that one-half of the net proceeds realized from the sale had been paid to her former husband and one-half, amounting to $1,760.25, had been paid to Ostatnik and Blum. This was confirmed by a canceled check for that amount made payable to "Ostanik and Blum, Attorneys for Theresa M. McMillan." Ostatnik and Blum testified that this check was endorsed and cashed by them at the bank and that the money was then and there divided equally between

them. They further testified that they considered the proceeds of this check to be their personal fee, and so treated it. However, they admitted that this was without the knowledge or consent of Mrs. Donaldson and that they had rendered her no bill for their charges for services.

Mrs. Donaldson testified that not until July, 1964, when she undertook to effect a property settlement with her former husband, did she learn that the house in which she owned a half interest had been sold. She immediately asked Ostatnik and Blum for an accounting of the proceeds from such sale but received none. Again, in September, 1964 she asked them for an accounting and received none. On May 24, 1965 she wrote a letter to Ostatnik and Blum again requesting an accounting, to which, she said, she received no reply. On August 2, 1965, Miller, whom Mrs. Donaldson had employed to inquire into the status of her affairs, wrote Ostatnik and Blum requesting an accounting of the proceeds of the sale of the property. This letter was not answered.

According to Mrs. Donaldson, after the Committee hearings had been concluded on June 17, 1966, she received from Ostatnik and Blum a bill showing that she owed them a balance of $539.76. This bill, she said, was accompanied by no itemized statement showing how the balance due was arrived at.

Thereafter, she said, in the fall of 1966, Ostatnik and Blum sent her an itemized bill covering several typewritten pages of charges against her from June 27, 1962 through August, 1964, amounting to $2736.50 These charges were preceded by a summary, "For Legal and Professional Services, $2700 [*sic*];" "Total payments, $2160.24;" "Balance due, $539.76." This statement made no mention of the proceeds received from the sale of the property nor did it show the source of the total payments credited against the charges. Thus, according to the testimony of Mrs. Donaldson which the lower court has accepted, there never was any accounting by the defendants to her of the proceeds of the sale of this property.

Ostatnik and Blum testified that in July or August, 1964, they wrote Mrs. Donaldson a letter enclosing a copy of the statement which she said she later received. However, they were unable to produce a copy of the letter or show just when it was sent. Inconsistent with this testimony is the copy of the statement which they said they sent Mrs. Donaldson was dated June 1, *1966.*

In any event, the testimony of the two defendants shows that they withheld from Mrs. Donaldson, for at least a year, the information that they had sold her property and without her knowledge or consent had applied the proceeds to the payment of charges for fees claimed to be due them. It further shows that these defendants applied the proceeds to the payment of charges for fees to which she had not agreed, and, indeed, of which she had never been notified.

Code §54-73 provides:

> "*Revocation or suspension of license by court.*— Any court before which an attorney has qualified, on proof being made that he has been convicted of a felony or of any malpractice, or of any corrupt unprofessional conduct, shall revoke his license to practice therein or suspend the same for such time as the court may prescribe."

Code §54-74, Subsection (6), provides:

> "'*Any malpractice, or any unlawful or dishonest or unworthy or corrupt or unprofessional conduct,*' as used in this section, shall be construed to include * * * the failure, without sufficient cause, within a reasonable time after demand, of any attorney at law, to pay over and deliver to the person entitled thereto, any money, security or other property, which has come into his hands as such attorney; * * * ."

It is clear that the evidence, which the lower court has accepted, shows that the conduct of Sara Blum and her partner was in violation of the provisions of §54-74(6), in that after repeated demands and without sufficient cause they failed to pay over and deliver to their client, who was entitled thereto, money which had come into their hands as attorneys.

Section 54-73 authorizes the revocation of the license of an attorney on the proof of such conduct. It leaves to the sound judicial discretion of the trial court, depending upon the circumstances of the particular case, whether that should be its judgment or whether lesser disciplinary action should be taken. *Maddy v. First District Com. of Virginia State Bar,* 205 Va. 652, 658, 139 S. E. 2d 56, 60. In the absence of a showing that such judgment is plainly wrong it should not be overturned.

Here, there is no such showing and there are aggravating circumstances. Not only did Sara Blum and her partner unlawfully withhold from their client money which was due to her, but despite repeated demands, they failed and refused to account to her for such funds. Moreover, they deceived her as to the status of her divorce suit and led her to believe that she was free to marry again. We agree with the conclusion of the trial court that the conduct of these attorneys was of such a "serious nature" that their licenses to practice law in this State should be revoked.

The other assignments of error, relating mainly to questions of procedure, are without substance and merit no discussion.

The judgment is

Affirmed.

APPENDIX B

August 2, 1965

OSTATNIK & BLUM
Attorneys at Law
104 South Columbus Street
Alexandria, Virginia

Re: Theresa Marie Donaldson (nee McMillan)

Dear Mr. Ostatnik and Mrs. Blum:

Mrs. Donaldson informs us that she wrote to you sometime ago concerning an accounting of the funds you have been holding since the sale of the house which was owned by Mrs. Donaldson and her former husband, Mr. McMillan.

As you know, it has been about a year since the decree was signed, and it is our understanding that the proceeds of the sale were in excess of your fee. We are representing the Donaldsons and would request that you advise her of the amount of the funds received from the sale of the house, and your total fee for representing Mrs. Donaldson.

The check for any amounts in excess of the fee should be sent to Mrs. Donaldson at your earliest possible convenience. In the event this is not done, we shall be forced to take the appropriate action.

Very truly yours,
MILLER, MILLER & CANBY

James R. Miller, Jr.

JRMJr:sal